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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1015

RALSTON PURINA COMPANY, ET AL. - Appellants

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL. - - - - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Appellees move that the judgment of the District Court be affirmed on the grounds that the questions presented are so unsubstantial as not to warrant further argument.

This is a direct appeal from a memorandum opinion and order of a three-judge United States District Court for the Western District of Kentucky, entered July 29, 1975, and judgment thereon entered September 26, 1975, setting aside and annulling a decision and order

of the Interstate Commerce Commission in Investigation and Suspension Docket No. 8849, *Feed Ingredients Mixed in Transit, Southern Territory.* Appellants also appeal from the lower court's denial of a motion to alter or amend the Court's order and remand the case to the Commission for further consideration. As we shall show, the questions presented by this appeal are so unsubstantial as not to warrant further argument and the District Court's decision should be summarily affirmed by this Court.

OPINIONS BELOW

The lower court's memorandum opinion and order is reported as *Louisville and Nashville R. Co.* v. *United States,* 397 F. Supp. 607 (D.C. Ky. 1975). In addition, this opinion and the Court's order denying remand, as well as the report and orders of the Commission, are attached to Appellants' Jurisdictional Statement as appendices.

QUESTIONS PRESENTED

1. Whether the three-judge District Court erred in setting aside and annulling the Commission's decision and order below.

2. Whether the three-judge District Court erred in refusing to remand the case to the Commission.

STATEMENT

By tariff schedules filed with the Commission to become effective on March 30, 1973, and later, Appellees and all other railroads in Southern Territory proposed to modify certain rules and regulations pertaining to the transit privileges applicable to soybean meal (when used as an ingredient in animal, fish or poultry feed) which are subject to more than one rate and varying carload minimum weights. The transit rule in effect at the time of the filing of the schedules provided that a 100,000 lb. carload of soybean meal could be shipped from its country origin to a transit point at the low 100,000 lb. rates, there be mixed with other ingredients to manufacture feed, which is then shipped to a final destination. When the feed moves from the transit point to final destination, the actual weight of the meal in the feed is assessed the low 100,000 lb. meal rate from country origin to final destination, even though there may be only 10,000 lbs. of meal in a 50,000 lb. shipment of feed.

This rule was an anomaly. The transit rule applicable to *all* other ingredients used in the manufacture of feed provides for the assessment of the higher through feed rate applicable from the origin of the ingredient of the feed to the final destination of the feed, based on the weight of the feed moving from the transit point to the final destination, regardless of the weight of the carload. This feed rate is applied to the actual weight of the individual ingredient in the feed.

Under the rule change involved here, the transit rule applicable to meal was brought into general con-

formity with all other rules applicable to the ingredients in transited mixed feed. Under the new rule, presently in effect subject to a Commission "keep account" order, the through rate on meal continues to be applied to the actual weight of the meal in the feed shipment, but that rate is determined by the weight of the outbound feed shipment and not by the weight of the heavier meal shipment inbound to the transit point.

After oral hearing at which all parties had full opportunity to present evidence in support of their positions, the Commission issued a decision in which it concluded that the proposed modification had not been shown to be just and reasonable.

On appeal, the three-judge District Court for the Western District of Kentucky held that the Commission relied almost totally on section 15a(2) of the Interstate Commerce Act (the Act) to support its conclusion and that the basis for the conclusion was that the rule change would result in diversion of traffic from Appellees with a resulting loss of revenue. It is these findings which purport to support the Commission's ultimate conclusion and which the lower court held to be without the support of the necessary substantial evidence of record. *Louisville and Nashville R. Co.* v. *United States,* 397 F. Supp. 607, 609-10 (W.D. Ky. 1975).

The lower court further held that no useful purpose would be served by remanding the case to the Commission. *Id.* at 610. The Commission moved the lower court to alter its decision and remand the case to the Commission for further consideration. Appellants did

not join in that motion or otherwise support the request for remand. After consideration of memoranda in support and in opposition to the motion for remand, it was denied by the lower court on September 26, 1975.

Appellants, who were the shipper protestants in the Commission proceedings, have taken this appeal. The United States and the Commission do not join in the appeal.

THE QUESTIONS PRESENTED ARE UNSUBSTANTIAL

I

The Lower Court Correctly Held the Commission's Conclusion to Be Unsupported By Substantial Evidence.

Appellants argue, without citation of authority that since the Commission merely concluded that Appellees had not met their burden of proof, this so-called "negative" conclusion need not be supported by substantial evidence, and that the lower court erred in holding that the negative conclusion requires the support of substantial evidence. Such an argument perverts the requirements of the Administrative Procedure Act and would allow the Commission to effectively insulate itself from judicial review.

First, the precise basis for the Commission's ultimate conclusion must be determined. Appellants argue that it is supported by findings that the then-existing variation from normal transit is not significant, that the rule change would not increase car utilization, and

that Appellees have not met their burden of proving the change to be just and reasonable. But these are nothing more than conclusions supporting conclusions. The necessary findings must be sought elsewhere in the Commission's decision.

The lower court correctly determined that the basic underpinning of the Commission's ultimate conclusion was its reliance on section 15a(2) of the Act and its belief that the rule change would result in a loss of traffic to Appellees and a consequent loss of revenue. *Id.* at 609-10. Clearly, there can be no other basis for the Commission's decision. After full briefing, oral argument and a review of the record in its entirety (*id.* at 610), the lower court unanimously determined that "the evidence which the Commission relied on for its decision consisted of testimony from representatives of the four shipper defendants." *Ibid.*

Clearly these findings require the support of substantial evidence. The Administrative Procedure Act does not refer to "negative findings" but specifically provides that an agency order may not be issued

> ". . . except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C.A. §556(d).

The Administrative Procedure Act further provides that all decisions of an agency shall include a statement of

> "(A) findings and conclusions, and the reasons or basis therefor on all the material issues of fact, law, or discretion presented on the record; . . . ." 5 U.S.C.A. §557(c).

The lower court correctly decided that the Commission's decision must include basic essential findings in support of its conclusions and that these findings must be supported by the substantial evidence of record. *Id.* at 609-10. Appellants' contention that the Commission's conclusion that Appellees have failed to sustain their burden of proof need not be supported by essential findings supported by substantial evidence is not in accordance with the law and is without merit. The lower court transferred no burden to Appellants. It determined that the findings relied upon by the Commission in support of its conclusion were without support of the substantial evidence of record and that the decision cannot therefore be upheld. There is nothing novel or unusual here.

II

The Decision of the Lower Court Is in Full Accord With Established Principles of Judicial Review.

Appellants urge that the lower court improperly substituted its judgment for that of the Commission. In support of this assertion, Appellants quote from the opinion below where the court comments on the rule change at issue before the Commission.

The quoted language is nothing more than dicta and does not reflect the specific holding of the lower court.

That court is well aware of the scope of review of Commission decisions and it fully recognized that it must give weight to the expertise of the Commission. *Id.* at 610. After stating the limitations of a reviewing court, the Court went on to specifically hold:

> "With the standards hereinabove enumerated in mind and after a review of the record in its entirety, the court finds that there is not substantial evidence to support the commission's finding that plaintiffs have failed to meet their burden of showing that the new tariff schedule is just and reasonable." *Ibid.*

The quoted language is the holding of the Court, and it is clearly in accordance with established principles of judicial review.

Appellants' reliance on *Consolo* v. *Federal Maritime Comm'n,* 338 U. S. 607 (1966), cited on page 12 of the Jurisdictional Statement, is misplaced. The lower court in that case reviewed the evidence and decided that on the basis of that evidence the Federal Maritime Commission should not have awarded reparations. *Id.* at 618; *Flota Mercante Grancolombiana* v. *Federal Maritime Comm'n,* 342 F. 2d 924, 931 (D.C. Cir. 1964). Here the Court refrained from determining what it believed the Commission ought to have done, and limited its holding to the narrow ground that the Commission's findings are unsupported by substantial evidence.

The lower court correctly found the Appellants' conjectural allegations of traffic diversion to be insufficient to support a Commission finding that Appellees

would suffer a "considerable" loss of traffic as a result of the new rule, referring to this Court's decision in *United States* v. *Chicago, M. St. P. & P. R.R.,* 294 U. S. 499 (1935). In that case, this Court affirmed a lower court order setting aside a Commission decision. The Court held the Commission decision to be deficient for failure to make specific findings as to the extent of the expected revenue loss and whether the alleged impairment of revenues would be trivial or substantial. *Id.* at 508. The Commission decision below suffers the same infirmity and the lower court correctly so held.

III

The Lower Court Correctly Determined That a Remand to the Commission Would Be Fruitless.

Appellants complain bitterly here of the lower court's refusal to remand the case to the Commission, for reconsideration of an evidentiary record already nearly two and one-half years stale. This allegation of error is without merit.

In the District Court, only the Commission and the United States moved the Court for a remand to the Commission. Although given ample opportunity to do so, Appellants decided not to join in that motion or otherwise to support it. The motion was denied and the Commission and the United States have declined to join the appeal here. Thus, the parties with the greatest interest in securing a remand have declined to pursue the matter further. In these circumstances, and in the absence of a request by the Commission or

the United States, a remand by this Court is inappropriate. *Zuber* v. *Allen,* 396 U. S. 168, 196 (1969). If the Commission does not appeal the decision of the lower court, that should be an end to the matter.

Appellants urge that the lower court relied, improperly, on evidence showing that loss of traffic by Appellees would improve their financial position and urge a remand for the Commission to consider the point. Again, Appellants are attempting to direct attention away from the precise holding of the Court below. The Court held there is no substantial evidence to support the Commission's finding that Appellees would experience a loss of *net* revenue by the transit rule change. In so holding, the District Court noted that not only does the Commission's finding lack substantial evidence, it lacks *any* evidence, since the only evidence on this point was evidence which showed to the contrary. Thus, the lower court did not rely on Appellees' evidence that the loss of feed traffic would result in improvement of Appellees' financial position, but simply noted in passing that this was the only evidence of record on this point, thus buttressing the Court's entirely correct holding that there is no substantial evidence to support the Commission's finding that a diversion of feed traffic would result in a loss of revenue to Appellees.

In any event, Appellants only objected to the evidence and did not attempt to rebut it (Tr. 27). The objection was not pressed and is thus waived (49 C.F.R. 1100.87).

Finally, Appellants urge that a remand is necessary to allow Commission consideration of alleged preference and prejudice violations of Section 3(1) of the Act. On consideration of the record before the Commission, the lower court properly declined to remand the case, noting it "would serve no useful purpose" (397 F. Supp. at 610).

In order for the Commission to make valid findings that a particular rate or rule unduly prefers a particular shipper or group of shippers over another shipper or group of shippers, it must first find that "the transportation conditions with regard to the prejudiced and preferred points are substantially similar. (Citing cases)." *Atchison, T. and S.F. Ry.* v. *United States,* 218 F. Supp. 359, 366 (D.C. Ill. 1963). Further, it is well established that undue prejudice and preference must be proven by clear and unmistakable evidence. General declarations as to competition and injury, unsupported by evidentiary facts, are insufficient. *Pie Bakeries, Inc.* v. *Railway Express Agency, Inc.,* 225 I.C.C. 171, 174 (1937).

The lower court reviewed and examined the record in its entirety *(ibid.)* and clearly concluded it contained no evidence upon which to base such findings. There is not a shred of evidence below bearing on the transportation conditions between the alleged prejudiced and preferred points. This deficiency alone renders remand for this purpose useless.

CONCLUSION

Appellants urge that important questions of administrative law are presented by this appeal, yet the administrative agency most concerned with these questions does not consider the questions to be sufficiently significant to warrant appeal.

From the foregoing, it is clear that the District Court's decision is in all respects correct. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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